INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	4
Reasons for granting the writ	7
Conclusion	17
Appendix A	1a
Appendix B	19a
Appendix C	20a
Appendix D	21a

CITATIONS

Cases:

American-Hawaiian S.S. Co. v. *Willfuehr*, 274 Fed. 214, affirmed *sub nom. United States Fidelity & Guaranty Co.* v. *American-Hawaiian S.S. Co.*, 280 Fed. 1023	15
Central American S. & T. Corp. v. *Mercantile Ship R. Co.*, 73 F. Supp. 779	15
Christman v. *Maristella Compania Naviera*, 349 F. Supp. 845, affirmed *per curiam*, 468 F. 2d 620	15
Clark v. *United States*, 95 U.S. 539	11, 12
Excote Manufacturing Co. v. *United States*, 169 F. Supp. 483	8
Hastorf v. *F. R. Long-W. G. Broadhurst Co.*, 239 Fed. 852	15
Hellenic Lines, Ltd. v. *Gulf Oil Corp.*, 340 F. 2d 398	15
Kossick v. *United Fruit Co.*, 365 U.S. 731, rehearing denied, 366 U.S. 941	15
Northern Star S.S. Co. v. *Kansas Milling Co.*, 75 F. Supp. 534	15
Orient Mid-East Lines v. *Albert E. Bowen, Inc.*, 458 F. 2d 572	15

554-147—74——1

Page

Cases—Continued
Penn-Ohio Steel Corp. v. *United States*, 354 F. 2d 254 8
Udall v. *Tallman*, 380 U.S. 1 13
Union Fish Co. v. *Erickson*, 248 U.S. 308 15
United States v. *New York & Porto Rico S.S. Co.*, 239 U.S. 88 12, 13
Statutes and regulations:
Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 40 U.S.C. 471, *et seq* 13, 14
40 U.S.C. 474(a) 13, 14
40 U.S.C. 486(c) 13
Pub. L. 480, 68 Stat. 454, as amended, 7 U.S.C. 1721–1725 14, 15, 16
Revised Statute 3744, 40 Stat. 198 (repealed in 1941, 55 Stat. 743) 11, 12, 13
Supplemental Appropriation Act of 1955, Section 1311, 68 Stat. 830, as amended, 31 U.S.C. 200 2, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17
7 U.S.C. 1701–1709 13, 15
15 U.S.C. 714c(g) 14
22 C.F.R. Part 211 15
28 U.S.C. 1292(b) 5, 6
7 C.F.R. 11.1(a) 14, 13
7 C.F.R. 11.12(a) 13
22 C.F.R. Part 211 15, 16
41 C.F.R. 1–1.208, 1–1.219 13
FPR 1–1.208 13
Miscellaneous:
39 Comp. Gen. 829 8, 13
51 Comp. Gen. 631 8
100 Cong. Rec. 11476 10
Executive Order 10900, January 10, 1961, 26 Fed. Reg. 143 15, 16
Report of the Committee on Appropriations, H. Rep. No. 2266, 83d Cong., 2d Sess 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-25

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN RENAISSANCE LINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–18a), is reported at 494 F. 2d 1059. The district court did not issue an opinion. Its order of August 16, 1972, certifying a question of law for interlocutory appeal (App. C, *infra*, p. 20a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 19a) was entered on February 27, 1947. On May 23,

1974, Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to July 27, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether all oral contracts entered into by the United States are by statute rendered invalid and unenforceable by either party.

2. Whether the Commodity Credit Corporation is prohibited by its regulations from entering into valid and enforceable oral contracts, made in accordance with maritime custom, for the charter of a ship to carry grain overseas.

STATUTE AND REGULATIONS INVOLVED

The Supplemental Appropriation Act of 1955, Section 1311, 68 Stat. 830, as amended, 31 U.S.C. 200, provides:

> Documentary evidence of obligations.
>
> (a) *Requirement; character of evidence.*
>
> After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—
>
> (1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed; or

(2) a valid loan agreement, showing the amount of the loan to be made and the terms of repayment thereof; or

(3) an order required by law to be placed with a Government agency; or

(4) an order issued pursuant to a law authorizing purchases without advertising when necessitated by public exigency or for perishable subsistence supplies or within specific monetary limitations; or

(5) a grant or subsidy payable (i) from appropriations made for payment of or contributions toward, sums required to be paid in specific amounts fixed by law or in accord with formulae prescribed by law, or (ii) pursuant to agreement authorized by, or plans approved in accord with and authorized by, law; or

(6) a liability which may result from pending litigation brought under authority of law; or

(7) employment or services of persons or expenses of travel in accord with law, and services performed by public utilities; or

(8) any other legal liability of the United States against an appropriation or fund legally available therefor.

(b) *Report by agency heads in connection with requests for proposed appropriations.*

Hereafter, in connection with the submission of all requests for proposed appropriations to the Office of Management and Budget, the head of each Federal agency shall report that any statement of obligations furnished therewith consists of valid obligations as defined in subsection (a) of this section.

(c) *Same; certification and records; reten-*

tion for audit; prohibition against redelegation of responsibility.

Each report made pursuant to subsection (b) of this section shall be supported by certifications of the officials designated by the head of the agency, and such certifications shall be supported by records evidencing the amounts which are reported therein as having been obligated. Such certifications and records shall be retained in the agency in such form as to facilitate audit and reconciliation for such period as may be necessary for such purposes. The officials designated by the head of the agency to make certifications may not redelegate the responsibility.

(d) *Restriction on use of appropriations or funds.*

No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section; but no such appropriation or fund shall remain available for expenditure for any period beyond that otherwise authorized by law.

(e) *Amounts to be included in statements of obligations to Congress.*

Any statement of obligation of funds furnished by any agency of the Government to the Congress or any committee thereof shall include only such amounts as may be valid obligations as defined in subsection (a) of this section.

Regulations at issue are reproduced in App. D, *infra*, pp. 21a–23a.

STATEMENT

On or about May 4, 1966, the Commodity Credit Corporation (CCC) issued by telephone and telegram a general invitation to maritime shippers to bid on the carriage of a cargo of grain from the United States to South Vietnam. The terms of the invitation required that all offers be made in person or by telephone. Respondent, American Renaissance Lines (ARL), through its agent, Universal Shipping Corporation, offered to supply the SS EVILIZ, ready to receive the cargo by May 23, in accordance with the invitation for bids. On May 9, 1966, the CCC accepted the offer. On May 11, 1966, ARL sought CCC permission to substitute another vessel for the SS EVILIZ, to which the CCC consented. On May 18, 1966, only five days before the ship was to be ready to receive cargo, ARL repudiated the contract and refused performance. It offered to absorb any extra charges caused by its failure to provide the ship promised.[1]

The government did not accept ARL's offer of limited damages and subsequently brought this suit in the United States District Court for the District of Columbia to recover its additional shipping and handling costs as well as storage costs incurred by ARL's breach of contract, totalling $40,304.67. ARL answered and moved for a judgment on the pleadings, on the ground, *inter alia*, that the agreement between CCC and ARL was unenforceable because it was not

[1] These facts are taken from the opinion of the court of appeals (App. A, *infra*, pp. 2a–3a; 494 F. 2d at 1061) and from the complaint and telegraphic invitation for bids, a copy of each of which we are lodging with the Clerk. Since the decision of the court of appeals was on a certified question, there has been no trial on the merits. Under the terms of the invitation for bids the contract incorporated the terms of the telegraphed invitation and the standard USDA Grain Charter Party (March 1, 1963, revision).

in writing. The district court denied the motion, and ARL moved for reconsideration, or alternatively for the court to state that the question of writing was a controlling question of law permitting interlocutory appeal under 28 U.S.C. 1292(b). ARL's motion for reconsideration was denied, but the district court noted for interlocutory appeal the question whether "the Commodity Credit Corporation may enter into a charter contract by oral agreement in light of 31 U.S.C. 200, the Federal Procurement Regulations, and CCC's published Regulations * * *" (App. C, *infra*, p. 20a). On October 13, 1972, the court of appeals accepted the interlocutory appeal.

The court of appeals' ruling on the statutory question held that Section 1311(a) of the Supplemental Appropriations Act of 1955, as amended, 31 U.S.C. 200(a), constitutes a federal statute of frauds, making all oral contracts by the federal government unenforceable (App. A, *infra*, p. 5a; 494 F. 2d at 1062). As "further support" (App. A, *infra*, p. 11a; 494 F. 2d at 1065) for its view that a written contract was necessary to bind ARL, the court of appeals also concluded that several regulations of the Executive Branch, which it deemed applicable, specified the requirement of a writing (*ibid.*).

In concluding, the court added, though these questions were not certified to it and had not been the subject of fact finding, that its conclusion rested on two additional grounds: (1) the parties seemed to have contemplated a written contract, and (2) where complex matters are the subject of agreement, written contracts are preferred as a matter of policy (App. A, *infra*, p. 17a; 494 F. 2d at 1068).

REASONS FOR GRANTING THE WRIT

1. The court of appeals' decision in this case, which is the first judicial construction of Section 1311(a) of the Supplemental Appropriations Act of 1955, as amended, 31 U.S.C. 200(a), has converted this statute governing the internal reporting of government obligations, into a statute of frauds thus, unexpectedly, rendering unenforceable virtually all existing government contracts not in writing, and prohibiting the use of oral contracts by the government in the future, no matter how reasonable, or how much in accord with commercial practice. The far reaching and disruptive effect of this decision is readily apparent. While most government contracts are eventually reduced to writing, it is as important for the government as for private parties to be able to enter into agreements that are binding before they are reduced to writing.

This case presents an example of the utility of oral agreements. Needing a ship on a close time schedule, the CCC followed normal commercial practices (see n. 9, *infra*) in making an oral acceptance of ARL's oral offer.

We are informed by the General Services Administration that purchases of goods and services for domestic disaster relief are often made by oral contract as are purchases of many routine services. In addition, in selling stockpiled commodities of all sorts the government, in accordance with normal commercial procedures, sells by oral offers and acceptances later confirmed in writing.

554-147—74——2

These are only some examples of the use of oral contracts by the government that would be interrupted if the decision of the court of appeals is allowed to stand. We have no way to estimate the number or dollar value of individual contracts that the decision below would render unenforceable by either party.

2. The court of appeals' interpretation of 31 U.S.C. 200 is in direct conflict with the construction given that statute by the Comptroller General and conflicts in principle with decisions by the Court of Claims. The Comptroller General interprets 31 U.S.C. 200 as intended merely to insure that Congress receives accurate reports of the status of appropriated funds. 51 Comp. Gen. 631 (1972). The Comptroller General has also ruled that there is no federal statute of frauds. 39 Comp. Gen. 829, 831 (1960). This latter general proposition has also been adopted by the Court of Claims. *Escote Manufacturing Co.* v. *United States,* 169 F. Supp. 483 (Ct. Cl.); *Penn-Ohio Steel Corp.* v. *United States,* 354 F. 2d 254 (Ct. Cl.). The Court of Claims did not, of course, refer to 31 U.S.C. 200. That statute, so far as we know, has never before been urged as a statute of frauds.

There is, therefore, a conflict between the Court of Appeals for the District of Columbia, on the one hand, and the Comptroller General and the Court of Claims, on the other, that requires resolution.

3. The decision of the court of appeals as to 31 U.S.C. 200 is in error.

a. 31 U.S.C. 200, which was enacted in 1955 as part of the Supplemental Appropriations Act of that year, provides:

> (a) * * * [N]o amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—
>
> (1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed; * * *.

The statute then proceeds to list seven other situations permitting recording of an obligation, including:

> (8) any other legal liability of the United States against an appropriation or fund legally available therefor.

The dispositive section of the statute, 31 U.S.C. 200(d), provides:

> No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section * * *.

The statute on its face does not purport to be a statute of frauds, or a change in the law of contracts, but rather a provision to define when a debt

may be recorded (*i.e.*, reported to the Office of Management and Budget) as an obligation of the United States applicable against an existing appropriation. The legislative history of 31 U.S.C. 200 also supports this conclusion. The statute was enacted as a result of congressional concern over budgetary maneuvers engaged in by executive agencies. Apparently, under the then existing procedures, agencies would inflate obligations reported against existing appropriations in order to justify new appropriations. See the Report of the Committee on Appropriations, H. Rep. No. 2266, 83d Cong., 2d Sess., pp. 49–50. In order to eliminate this practice Congress enacted 31 U.S.C. 200, defining obligations reportable against appropriations, as a device to help it provide proper budgetary oversight.[2]

---

[2] As Congressman Vorys stated during floor debate:

"We have all heard stories of the feverish rush in Government offices to get funds obligated toward the end of a fiscal year by bookkeeping and accounting maneuvers that bar reconsideration by Congress but leave the agency free to do as it pleases with such funds.

"This section, * * *, may stop such monkey business."

100 Cong. Rec. 11476.

The House Committee on Appropriations report states:

> This situation has become so acute as to make it next to impossible for the Committee * * * to determine with any degree of accuracy the amount which has been obligated against outstanding appropriations as a basis for determining future requirements. It has become necessary to set forth definitively in the law the types of transactions which will be recognized as true obligations and secure accurate reporting thereon in order that it may be possible for the [committee] to have a sound basis for its operations. Section [1311(a)] therefore has been included in the bill to accomplish this purpose.

H. Rep. No. 2266, 83d Cong., 2d Sess., p. 50.

The purpose of the statute was to provide Congress with accurate reports of obligations incurred by the agencies to make budgetary control possible.

b. The court of appeals, however, reasoned that although the statute "does not carry an inescapable interpretation as a statute of frauds" (App. A, *infra*, p. 17a; 494 F. 2d at 1068), the concern that prompted Congress to enact it is sufficiently broad to require that oral contracts not be enforced against the government, and thus not in its favor either (*ibid.*). In reaching this conclusion, the court relied chiefly on *Clark* v. *United States*, 95 U.S. 539, which held that Revised Statute 3744, 40 Stat. 198 (repealed in 1941, 55 Stat. 743)—requiring the Secretaries of War, Navy, and Interior to reduce their contracts to writing and to file them within a specified period . . . was a statute of frauds.[3] The court of appeals considered that statute sufficiently similar to 31 U.S.C. 200 to require the same result.

---

[3] Revised Statute 3744 provided "[i]t shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior * * *, as soon after the contract bids, offers, and proposals to him made by persons to obtain the same, as also a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal * * *." (This statute, known as Rev. Stat. 3744, was repealed in 1941, 55 Stat. 743.)

is made as possible, and within thirty days, together with all

In our view the two statutes are markedly different, and were passed for different purposes—one to insure accurate accounting, the other to prevent fraudulent claims against three branches of the government at a time when such protection was felt by Congress to be needed. Indeed, the repeal of Revised Statute 3744 in 1941, and the fact that its language was not subsequently incorporated into 31 U.S.C. 200 in 1955 is an indication that Congress was not contemplating a statute of frauds by enacting the 1955 act.

Moreover, the decision in *Clark* v. *United States, supra,* only barred the enforcement of an oral contract *against* the government. When confronted by a suit on an oral contract by the government against a private party, as is the case here, the Supreme Court allowed the contract to be enforced notwithstanding Rev. Stat. 3744. *United States* v. *New York & Porto Rico S.S. Co.,* 239 U.S. 88. The Court reasoned that since the statute was designed to protect the government, a private party could not take advantage of it to shield itself from liability for its failure to perform. *Id.* at 92–93. Thus, if 31 U.S.C. 200 is equated to Rev. Stat. 3744, the decision of the court of appeals is contrary to this Court's decision in *United States* v. *New York & Porto Rico S.S. Co., supra.*[4]

[4] The Government's position of "no mutuality" which the court of appeals referred to as offering "one-sided protection" (App. A, *infra*, p. 10a; 494 F. 2d at 1065) was the government's alternative argument that if 31 U.S.C. 200 were in fact a statute of frauds, then under *United States* v. *New York & Porto Rico S.S. Co., supra*, the contract would nevertheless be enforceable by the United States. There would be no question of "mutuality of obligation" under the government's primary argument that 31 U.S.C. 200 is not a statute of frauds.

4. The court of appeals, having decided that the contract between the CCC and ARL was invalid under 31 U.S.C. 200, in "further support [of its] view that a written contract is necessary to bind ARL" (App. A, *infra*, p. 11a; 494 F. 2d at 1065) concluded that certain sections of the Federal Procurement Regulations (FPR)[5] and the CCC regulations[6] also prohibit such a contract. We disagree with the court's interpretation of these regulations.[7] But, in any event, these regulations have no application to this case.

---

[5] 41 C.F.R. 1-1.208, 1-1.219.

[6] 7 C.F.R. 11.12(a).

[7] FPR 1-1.208 is a definitional section which in no way states, or is intended to state, that oral contracts made by the government are unenforceable. The General Accounting Office, which promulgated the FPR has consistently held that there is no federal statute of frauds. See 39 Comp. Gen. 829, 831 (1960). While that decision does not directly construe FPR 1-1.208, it shows that in the view of the Comptroller General the FPRs do not constitute a statute of frauds. The GAO's interpretation is reasonable and should be upheld. See *Udall* v. *Tallman*, 380 U.S. 1, 16.

Similarly, 7 C.F.R. 11.12(a) relied upon by the court of appeals does not support its conclusion that a ship fixture must be in writing. 7 C.F.R. 11.12(a) governs the financing of ocean transportation by the CCC for the shipment of foodstuffs sold to a foreign country under Title I of Pub. L. 480, 7 U.S.C. 1701-1709. See 7 C.F.R. 11.1(a). It does not purport to govern the enforceability of contracts but rather deals with the administrative procedure through which a foreign country may obtain CCC financing of the cost of ocean transportation under Title I of Pub. L. 480. The regulation requires the purchasing nation, which arranges for the transportation, to submit the ship charter for approval by the United States government. This would have no bearing on the validity of the contract between the foreign government and the carrier or here between the CCC and ARL.

The Federal Procurement Regulations were promulgated pursuant to the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 40 U.S.C. 471, *et seq.* See 40 U.S.C. 486 (c). That act, while calling for coordination with government procurement practices, exempts foreign aid, relief or rehabilitation, from the direct application of the statute and thus from the application of the Federal Procurement Regulations. 40 U.S.C. 474(a).[8] The program here, as recognized by the court of appeals (App. A, *infra*, pp. 12a–13a; 494 F. 2d at 1065–1066), falls within the foreign assistance exception to the Federal Property and Administrative Services Act.

Neither the organic statute of the CCC nor that agency's regulations lend any support to the court of appeals' conclusion. The CCC is directed by its organic act to employ the "customary channels, facilities and arrangements of trade and commerce" in the purchasing, selling and transporting of agricultural commodities (15 U.S.C. 714c(g)). The procurement of ships by oral contracts to be followed by formal

[8] 40 U.S.C. 474(a) after excepting foreign aid, provides "[t]hat the agency carrying out such program shall, to the maximum extent practicable, consistent with the fulfillment of the purposes of the program *and the effective and efficient conduct of its business*, coordinate its operations with the requirements of said chapters and the policies and regulations prescribed pursuant thereto" (emphasis supplied).

"charter parties" is a customary and usual arrangement in maritime commerce.[9]

CCC's regulations do not require writing. The grain shipped here was not sold to a foreign country under Title I of Pub. L. 480 which requires writing before the United States may be obligated to finance a sale by another party, but rather was donated pursuant to Title II of Pub. L. 480, 68 Stat. 454, as amended, 7 U.S.C. 1721–1725. Rather obviously, regulations concerning the financing of commodity sales do not govern the procurement of ships under the food relief program involved here. The administration of Title II, which

[9] The Federal courts have uniformly held that oral contracts are valid under Federal maritime law. *Kossick* v. *United Fruit Co.*, 365 U.S. 731, reh. den. 366 U.S. 941, *Union Fish Co.* v. *Erickson*, 248 U.S. 308. State Statutes of Fraud are not applicable to oral maritime contracts. *Kossick*, *supra*; *Hellenic Lines, Ltd.* v. *Gulf Oil Corp.*, 340 F. 2d 398 (C.A. 2). Oral contracts of affreightment or charter parties are ordinary and clearly enforceable. *Orient Mid-East Lines* v. *Albert E. Bowen, Inc.*, 458 F. 2d 572 (C.A. 2); *Hellenic Lines, Ltd.* v. *Gulf Oil Corp.*, *supra*; *Christman* v. *Maristella Compania Naviera*, 349 F. Supp. 845 (S.D. N.Y.), affirmed *per curiam*, 468 F. 2d 620 (C.A. 2); *American-Hawaiian S.S. Co.* v. *Willfuehr*, 274 Fed. 214, (D. Md.), affirmed *sub nom. United States Fidelity & Guaranty Co.* v. *American-Hawaiian S.S. Co.*, 280 Fed. 1023 (C.A. 4). See also *Hastorf* v. *F.R. Long-W.G. Broadhurst Co.*, 239 Fed. 852 (C.A. 2); *Northern Star S.S. Co.* v. *Kansas Milling Co.*, 75 F. Supp. 534 (S.D. N.Y); *Central American S & T. Corp.* v. *Mercantile Ship R. Co.*, 73 F. Supp. 779 (E.D. N.Y.).

does control this case, has been delegated by the President to the Department of State. Executive Order 10900, January 10, 1961, 26 Fed. Reg. 143. The Department of State has published comprehensive regulations on the transfer of agricultural products under the Title II (donation) program, 22 C.F.R. Part 211. These regulations, governing CCC participation in this program (see App. D, *infra*, pp. 22a–23a) do not require that the CCC use any particular form of charter, or that contracts be in writing to be valid between CCC and the carrier (App. A, *infra*, p. 15a; 494 F. 2d at 1067).

The court of appeals concluded, however, that the carrier had a right to assume CCC was operating under its own regulations, not State Department regulations. That conclusion is unsupportable since, among other things, the CCC regulations (Title I), on their face apply to transactions of a completely different nature than that involved here, while the Department of State regulations (under Title II), which do on their face apply to transactions such as this, show CCC's role and duties. Moreover, ARL's request for permission to substitute a different ship and ARL's subsequent unsolicited offer to pay storage charges when it reneged on its promise show that it understood the binding nature of its oral commitment.[10]

[10] The court also concluded that the oral agreement did not represent a final meeting of the minds of the two parties. However since the certified question on the interlocutory appeal was the enforceability of an oral contract, and the case had yet to proceed to trial, it must be assumed for the certified question that the parties intended an oral contract. If there is any doubt on this issue, it should also be resolved after a factual determination in the district court.

While the regulations do not support the court of appeals' conclusion, it is that court's misconstruction of 31 U.S.C. 200 to void all oral contracts made by the United States which is of special concern and requires review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
HARRY R. SACHSE,
Assistant to the Solicitor General.
ROBERT E. KOPP,
PAUL BLANKENSTEIN,
Attorneys.

JULY 1974.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 72-2109

UNITED STATES OF AMERICA

v.

AMERICAN RENAISSANCE LINES, INC., APPELLANT

Appeal from the United States District Court for the District of Columbia

(Argued 29 November 1973—Decided 27 February 1974)

Before: BAZELON, *Chief Judge*, and WILKEY, *Circuit Judge and* VAN PELT,* *United States Senior District Judge* for the District of Nebraska.

Opinion for the Court filed by *Circuit Judge* Wilkey.

WILKEY, *Circuit Judge:* This appeal was taken from an order of the District Court which, in effect, held that the Commodity Credit Corporation [CCC], a government agency, could enforce an oral charter agreement with a private shipping firm, the American Renaissance Lines, Inc. [ARL]. The District Judge denied defendant ARL's motion for judgment on the pleadings, however, believing that there was "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

ultimate termination of the litigation."[1] The District Judge certified the oral contract question to this court for an interlocutory appeal. After consideration of the certified question, we view the matter differently from the District Court and remand for action consistent with this opinion.

I. The Nature of the Charter Agreement

In May 1966 the CCC issued by telephone and telegraph a general invitation to private enterprise to bid on the carriage of a large amount of foodstuffs from the United States to South Vietnam. The invitation to bid required that all offers be delivered either in person or by telephone. Acting through its agent Universal Shipping Corporation, ARL entered a bid. On 9 May 1966 oral agreement was reached with CCC's agent, the Ocean Transportation Division of the Foreign Agricultural Service of the U.S. Department of Agriculture. ARL proposed the SS Eviliz to transport the foodstuffs under charter to the U.S. Government. The oral agreement was subject to the terms of the telegraphed invitation to bid, and the USDA Grain Charter Party (1 March 1963 Revision).[2] On 11 May 1966 the parties orally agreed through their agents to allow ARL to substitute

[1] 28 U.S.C. § 1292(b) (1970). If the District Judge so finds, the statute directs him to so state in his order. The Court of Appeals may then in its discretion permit an appeal.

[2] The telegram invitation to bid stated: "For full cargoes USDA Grain Charter Party dated March 1, 1963 (Revised) to be used." Appendix to Appellant's Brief at 6. A sample of the charter party is provided in the Appendix at 8–15. Examination of the sample charter party shows the document to be a highly detailed eight-page agreement, with blank spaces provided for insertion of material pertinent to each particular contract.

another ship for the SS Eviliz, which ARL had been unable to purchase.

ARL repudiated the oral agrement on 18 May 1966 and refused performance. However, ARL did offer by telegram to pay any extra storage charge until other carriage was obtained. This refusal of performance occurred before any written charter or contract had been signed. The failure of the agreement cause the Government additional storage, handling, and shipping costs, in the amount of $40,309.67.

In November 1971 the United States brought suit in District Court for the additional costs of $40,309.67 plus interest from May 1966. This dormant claim was thus revived 5½ years after the oral agreement had been breached, and several months after ARL had won a suit against the Government in the U.S. District Court for the Eastern District of New York on an unrelated admiralty action in the amount of $43,421.00.[3] ARL answered the government complaint and sought a judgment on the pleadings, in part on the ground that the CCC could not enforce a government charter agreement made orally only. After denial of the motion by the District Court, ARL moved for reconsideration or alternatively certification of the oral contract question to the Court of Appeals for an interlocutory appeal.[4] The District Court did not grant the substantive motion but did grant certification. We allowed the appeal by order of 13 October 1972.[5]

---

[3] *See* Brief for Appellant at 5-6.

[4] This was pursuant to 28 U.S.C. § 1292(b). *See* note 1 *supra*.

[5] The District Court's certification to the Court of Appeals is reproduced in Appendix at 99. Our order allowing the appeal is in Appendix at 100.

II. The Enforceability of the Oral Contract by the Government

The issue before this court is limited to the question whether the CCC, a government agency, can obtain damages for an unperformed oral contract for carriage. We believe that both the relevant statutes and regulations require that government contracts such as the charter agreement here be written in order to be enforceable by the Government. Hence, in answer to the certified question we hold that this oral contract is unenforceable.

A. THE STATUTE

In 1955 the Congress, troubled by executive spending,[6] enacted § 1311(a)(1) of the Supplemental Appropriation Act.[7] This section provided that

> After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—
>
> (1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed.[8]

---

[6] *See, e.g.*, 100 Cong. Rec. 13056–57 (1954).

[7] 68 Stat. 80, 31 U.S.C. § 200(a)(1) (1970).

[8] Other subsections of § 200(a) provide that documentary evidence of valid loan agreements, orders required by law to be placed with a government agency, and so forth will also meet the requirements.

The original purpose of the statute was to prevent executive officials from excessive or inappropriate spending.[2]

The parties to this litigation urge contrary interpretations of this provision. On the one hand, the Government urges that the statute is simply a recordation statute to facilitate auditing and has no effect on government contracts with private parties. On the other hand, ARL argues that the provision, in conjunction with certain regulations, establishes virtually a statute of frauds for such government contracts as involved here. Sustaining the government position here would remove reciprocally the protection of the Government which was the initial intent of the statute, and this we decline to do.

We hold that the statute does establish a requirement that government contracts of this type be in writing, and that contracts which are merely oral are not enforceable. We agree with the Government that this statute does not follow the typical statute of

---

[2] The House Report noted the purpose of the provision:

"Over a period of years numerous loose practices in handling appropriated funds have grown up in various agencies of the government. The most difficult problem in this area arises from the recording of various types of transactions as obligations of the government when in fact, no real obligation exists. This situation has become so acute as to make it next to impossible for the Committee on Appropriations to determine with any degree of accuracy the amount which has been obligated against outstanding appropriations as a basis for determining future requirements. It has become necessary to set forth definitively in the law the types of transactions which will be recognized as true obligations and secure accurate reporting thereon in order that it may be possible for the Committee on Appropriations to have a sound basis for its operations. Section 1111 therefore has been included in the bill to accomplish this purpose."

H. Rep. No. 2266, 83rd Cong., 2d Sess. 49–50 (1954).

frauds format.[10] But we do not believe that to be determinative. Rather, we feel that the Congress was concerned that the executive might avoid spending restrictions by asserting oral contracts, and so enacted the requirement of a writing.[11]

The Supreme Court long ago considered a similar question in *Clark* v. *United States*.[12] Although the statute there involved has since been repealed, it was similar to the statute here in that it required government contracts of certain departments to be in writing.[13] The Supreme Court held that this statute effectively established a statute of frauds. The oral agreement made by the Government to charter a steamer from a private party was hence void. The Court, however, did allow the owner of the steamer to recover from the Government for the value of services ren-

---

[10] *See* Brief for Appellee at 14–16.

[11] *See* note 9 *supra*.

[12] 95 U.S. 539 (1877).

[13] The statute provided

"That it shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, immediately after the passage of this act, to cause and require every contract made by them severally on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof, a copy of which shall be filed by the officer making and signing the said contract in the 'returns office' of the Department of the Interior * * * as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, as also a copy of any advertisement he may have published inviting bids, offers, or proposals for the same; all the said copies and papers in relation to each contract to be attached together by a ribbon and seal * * *."

Id. at 541. The statute, known as Rev. Stat. 3744, was repealed in 1941. 55 Stat. 743.

dered, on a theory of *quantum meruit*.[14] Justice Bradley wrote for the Court:

> The facility with which the government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this.[15]

While the *Clark* case dealt with a private party trying to collect from the Government, the principles enunciated above remain true when the situation is reversed and the Government is seeking damages. The requirement of a written contract protects both sides from the possibility of fraud or misinterpretation by the other. And, on the principle of mutuality, it is not appropriate for the Government to assert the lack of a written contract when it wishes an agreement to lapse, but to waive such an objection when it wishes to enforce an agreement.

In fact, if the Government's position of no mutuality were accepted, the agreement would not meet the basic contractual prerequisite of consideration from

---

[14] This was detrimental to the private party, for the ship was wrecked while in government hands. The oral contract had provided that the Government would bear the risk of destruction. But since the oral contract was void, the owner could not utilize that provision and was forced to bear the risk of destruction himself.

[15] 95 U.S. at 541–42.

each contracting party.[16] For if the Government could avoid its part of the bargain by asserting lack of a written contract, the Government would be making merely an illusory promise: the Government would pay the agreed price for the services only if *it* wished and if *it* had complied with the statute (and regulations, *infra*). The Government could avoid payment by citing the statute and its own failure to follow its own regulations, and then the private party would be limited to *quantum meruit*. Such an arrangement clearly would not satisfy the requirement of mutual consideration.

The Supreme Court decision in 1915 of *United States* v. *New York and Porto Rico SS Co.*[17] can be distinguished from the present case. In that earlier case, the Government sought to recover from a private steamship company which had not performed its written agreement to ship coal. The company raised as a defense the failure of the Government to comply with the exact writing requirements of the same statute as involved in *Clark*,[18] by not producing proper copies and seals. The Court held that the Government could waive the requirements because it was the only intended beneficiary of the protection. The private company "needs no such protection against a written undertaking signed by himself."[19] In the case at bar, however, what is lacking is not simply the proper form or seal but a written contract in its entirety.

---

[16] *See* 1 A. Corbin, Contracts § 145 at 628 (1963): "an illusory promise is neither enforceable against one making it nor is it operative as a consideration for a return promise." The Government's "promise" would be illusory if it could avoid it at will. *See also* 1 S. Williston, Contracts § 105 at 417 (3rd ed. 1957).

[17] 239 U.S. 88 (1915).

[18] *See* note 13 *supra*.

[19] 239 U.S. at 93.

Such of the entire agreement as was made was made orally, and no writing was sent until after the agreement was repudiated. ARL claims that vital provisions were never agreed upon, and disputes the CCC version of what was actually agreed to, *e.g.*, whether long or short tons were meant is still in controversy. Protection for the private company, as well as the Government, is necessary under these circumstances.

A somewhat related issue was considered by the Court of Claims in *Escote Manufacturing Co.* v. *United States.*[20] There the court stated that an oral contract to buy surplus government property was as binding on the private party as if it had been in writing. However, the facts in *Escote* are markedly different from this case. In *Escote* the private bidder had sent a written bid and check for deposit in response to the Government's invitation to bid for surplus goods. The Government then sent the bidder a letter containing three copies of a form headed "Invitation, Bid, and Acceptance" for signature by the bidder. The bidder sought to avoid the contract on the ground that the contracting officer of the Government had not signed the form, but his name was only typewritten. Thus, the issue was not whether there was a written agreement, but simply whether the signature of the contracting officer was required.

Although *Escote* was decided after the 1955 statute requiring written contracts, the Court of Claims stated that the parties had not identified any statute requiring a writing. The court felt that the contract forms sent by the Government to the private buyer, which were not signed, were merely part of the Government's bookkeeping system. At no time in its opinion did the court give consideration to the statute or

[20] 144 Ct. Cl. 452, 169 F. Supp. 483 (1959).

regulations in effect here. Consequently, the *Escote* opinion is of limited value in deciding this case.[21]

We view the statute as establishing a requirement that a government contract as involved here be in writing before either party may be allowed to obtain court enforcement of the agreement. The statute admittedly is not phrased as the typical statute of frauds. It is more specific, in that it requires that the contract be supported by documentary evidence of a binding agreement in writing.[22] Although the statute simply bars recording oral contracts as obligations of the Government,[23] this does not mean that recordation is the only purpose or effect of the statute. If the Government does not fulfill the recordation requirements, it can neither automatically take the benefit of an agreement it has allegedly made, nor can it be hurt by another party alleging an agreement. Mutuality of protection is thus provided, and we do not see by the Government's interpretation of the statute anything but one-sided protection would be afforded.

---

[21] Similarly unhelpful is the Court of Claims decision in *Penn-Oil Steel Co.* v. *United States*, 173 Ct. Cl. 1064, 354 F. 2d 254 (1965). The Court of Claims again asserted that federal law did not require a contract to be in writing. The context of this decision was an action by a steel products plant lessee against the Government for alleged breach of a lease by the Navy, the lessor. Again, no citations to the statute at hand in the case at bar appear in the Court of Claims opinion.

[22] See p. 4 *supra* for the precise statutory language.

[23] The Government argues that 31 U.S.C. § 200(a)(8) dissipates the requirement of a writing which we believe is established by § 200(a)(1). Section 8 provides that the recordation requirements will be satisfied by documentary evidence of "any other legal liability of the United States against an appropriation or fund legally available therefor." We do not believe that section 8 was intended to swallow up the other provisions, but instead it was intended to develop another, independent category requiring documentary evidence.

We believe that this interpretation of the statute is in accordance with the legislative intentions. The House Conference Report on the provision offers a succinct summary of the legislative view:

> Section 1311(a)(1) precludes the recording of an obligation unless it is supported by documentary evidence of a binding agreement between the parties as specified therein. It is not necessary, however, that this binding agreement be the final formal contract on any specified form. The primary purpose is to require that there be an offer and an acceptance imposing liability on both parties. For example, an authorized order by one agency on another agency of the Government, if accepted by the latter and meeting the requirement of specificity, etc., is sufficient. Likewise, a letter of intent accepted by a contractor, if sufficiently specific and definitive to show the purposes and scope of the contract finally to be executed, would constitute the binding agreement required.[24]

B. THE REGULATIONS

Several regulations of the Executive branch further support our view that a written contract is necessary to bind ARL here. The regulations include general Federal Procurement Regulations[25] and regulations specific to the CCC.[26]

The Federal Procurement Regulations [FPR's] were promulgated pursuant to the Federal Property Act[27] to regulate all government agency procurement.

---

[24] H. Rep. No. 2663, 83rd Cong., 2d Sess. 18 (1954).

[25] 41 C.F.R. §§ 1-1.208, 1-1.219 (1973).

[26] 7 C.F.R. § 11.12(a) (1973).

[27] 40 U.S.C. § 486(c) (1970).

Specifically FPR § 1–1.208 provides a definition of contract:

> "Contract" means establishment of a binding legal relation basically obligating the seller to furnish personal property or nonpersonal services (including construction) and the buyer to pay therefor. It includes all types of commitments which obligate the Government to an expenditure of funds and which, except as otherwise authorized, *are in writing*. In addition to a two-signature document, it includes all transactions resulting from acceptance of offers by awards or notices of awards; agreements and job orders or task letters issued thereunder; letter contracts; letters of intent; and orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance. It also includes contract modifications. (Emphasis added.)

FPR § 1–1.219 defines "contract modification" to be "written alteration."

The Government urges that § 1–1.208 merely says that a contract is the "establishment of a binding legal relation" and is broadly defined to include oral agreements. We believe that the Government has misinterpreted the definition. The regulation requires a writing, except as otherwise authorized. It does not require a formal two-signature document, but it does require some form of writing, whether letters of intent, or purchase orders, or some other written manifestation.

It must be noted that the scope of the FPR's is limited by the Federal Property Act, which states in relevant part that the Act and accompanying regulations shall not be interpreted to impair the authority of any executive agency with respect to any phase, including transportation,

> of any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments, or foreign aid, relief, or rehabilitation: *Provided,* That the agency carrying out such program shall, to the maximum extent practicable, consistent with the fulfillment of the purposes of the program and the effective and efficient conduct of its business, coordinate its operations with the requirements of said chapters and the policies and regulations prescribed pursuant thereto.[28]

Thus, while the FPR's are not mandatory, and agencies may carve out exceptions, there is strong pressure on the CCC to conform to them insofar as possible.[29]

The CCC has not adopted regulations exempting it from the writing requirement in the FPR definition of contract. Not only do CCC regulations explicitly adopt the FPR's,[30] but also CCC's own regulations incorporate an additional writing requirement.[31] And, the Government has pointed to no cases wherein the CCC has stated that it rejects the requirement of a writing. The Government does suggest that the CCC's charter instructs it to follow the usual and customary channels of trade and commerce,[32] and that oral contracts to be

---

[28] 40 U.S.C. § 474(2) (1970).

[29] See also FPR § 1-1.009-2, requiring deviations to be minimized, and § 1-1.009-1 defining deviations.

[30] 41 C.F.R. § 4-1.104-1 (1967): "Procurement by the Department of Agriculture is subject to the FPR . . . except as may be otherwise authorized by law."

[31] The CCC regulations are discussed in detail at pp. 14-17.

[32] 15 U.S.C. § 714b(h), c. In particular, § 714c requires that in the transporting of agricultural commodities,

"the Corporation shall, to the maximum extent practicable consistent with the fulfillment of the Corporation's purposes and the effective and efficient conduct of its business, utilize the

followed by written charters are customary. Whether such oral agreements are customary in shipping, we do not believe that the CCC charter provision was intended to cover the formalities of a contract; rather, it tells the CCC to use normal commercial, as opposed to governmental, means for transporting goods. In the face of the regulations governing the CCC, this charter provision should not be interpreted as removing the writing requirement.

A regulation more directly applicable to the CCC is 7 C.F.R. § 11.12(a), which provides specifically for ocean transportation of goods for the CCC:

> The cost of ocean transportation will be financed by CCC only when specifically provided for in the purchase authorization. Unless the purchase authorization provides otherwise, this section will apply to the financing of ocean transportaton. Unless otherwise specifically provided in the applicable purchase authorization or unless otherwise requested by FAS, the pertinent terms of all proposed charters * * * and all proposed liner bookings must be submitted to the appropriate USDA Office * * * for review and approval prior to fixture of the vessel. Tentative advance approvals may be obtained by telephone or telegram, provided Form CCC 105, Ocean Shipment Data-PL 480 ("Request for Vessel Approval"), is furnished promptly confirming the information supplied by telephone or telegram. Approvals of charters and liner bookings will be given on Form CCC 106, "Advice of Vessel Approval."

Thus, use of particular forms is required prior to "fixture" of a ship. While the regulation does not ex-

---

usual and customary channels, facilities, and arrangements of trade and commerce."

Neither of the parties has cited to this court any cases interpreting the CCC charter, and we have found none ourselves.

plicitly state that an oral contract is unenforceable, that meaning is apparent.

The Government objects that the CCC regulations are inapplicable because the foodstuffs were being shipped under Title II of PL 480, rather than Title I. The significance of this difference is that Title I provides for the *sale* of surplus agricultural commodities overseas and is administered by the U.S. Department of Agriculture. Title II provides for the *donation* of surplus agricultural commodities for relief and is administered by the State Department. The CCC regulations apply only to Title I.[33] The State Department regulations do not provide any form or writing requirement for a contract.[34]

As ARL correctly points out, there was no indication given by the Government that Title II rather than Title I activity was being undertaken. ARL was negotiating with the CCC and had a right to assume that the CCC would follow its own published regulations. Furthermore, while Title II regulations do not mention writing of contracts, AID has specifically adopted the FPR's in general, with no exception from

---

[33] § 11.12(a), in text *supra*.

[34] *See* 22 C.F.R. Part 211 (1967). However, § 211.5(b) should be noted. This provides that

"A separate Transfer Authorization will be issued to cover the ocean freight financed by the United States. Disbursement to carriers shall be made by USDA upon presentation of Standard Form 11-13, three copies of SF 11-13a, three copies of the ocean bill of lading, and a signed copy of the booking agreement."

This would seem to indicate that something must be written before USDA will pay. The effect of this provision is weakened by § 211.10, which states that "AID may waive, withdraw, or amend, at any time, any or all of the provisions of this Part 211."

the definition of contract.[35] So, even if Title II were applicable, the FPR definition would still be effective.

The Government also argues that even if Title I were applicable, it merely establishes requirements for importing countries to produce written charters for ocean transportation to obtain USDA approval of financing.[36] Whether or not the writing requirement is directed to importing countries or shippers, the fact remains that certain forms are to be used before USDA approval will be granted; USDA need not finance any non-conforming charters. We believe this suggests a requirement of a written contract, similar to the statutory requirement. Unenforceability of any oral agreement determines the position of both parties: just as USDA could refuse to finance the oral charter here, so, too, can ARL raise the lack of a writing as a defense to an action for breach of contract.

---

[35] 41 C.F.R. § 7–1.103 (1967), in effect when the agreement was made, states that

"Unless a deviation is specifically authorized in accord with AIDPR 7–1.107, or unless otherwise provided, FPR and AIDPR apply to all procurements * * * of personal property and nonpersonal services to which AID is a direct party. This regulation does not apply to procurements by other parties, such as borrowers and grantees, which are financed under programs administered in whole or part by AID, nor to contracts entered into jointly by AID and the borrower or grantee to make a procurement from a third source for an overseas program or activity."

Furthermore, 41 C.F.R. § 7–1.107–2 (1973), which became effective on 26 October 1967, states that

"It is the policy of AID that deviation from the mandatory requirements of FPR and AIDPR shall be kept at a minimum, and be granted only if it is essential to effect necessary procurement and when special and exceptional circumstances make such deviation clearly in the best interests of the Government."

[36] *See* Brief for Appellee at 24.

III. Conclusion

We conclude that an oral agreement for charter of a ship, such as involved in this case, is not sufficient to allow the Government to recover in a damage action for breach of contract. The applicable statute and regulations require a written agreement. We reach this conclusion not only on the basis of the statute and regulations, but also on two additional factors.

First, the parties themselves seem to have contemplated a written agreement, as indicated by the incomplete USDA Grain Charter Party which was to be used. Given the extent of the unfilled blanks in the form, it appears that the oral agreement did not represent a final meeting of the minds of the two parties.[37]

Second, the nature of the contract at issue here is lengthy and complex. The parties do not agree now on all of the proposed terms of the agreement.[38] Where such complex transactions are involved, there is a policy favoring written agreements.[39]

Recapitulating our analysis of the position of the parties in regard to the statute, we can readily see that the wording of the 1955 Act, cast as it is in the phraseology "no amount shall be recorded as an obligation of the Government," and enacted for the primary purpose of keeping free-spending officials in check, does not carry an inescapable interpretation as a statute of frauds. Yet the 1955 statute does call for "docu-

[37] Other cases have denied enforcement of an agreement where the parties contemplated but did not complete a written contract. *See, e.g., Orient Mid-East Great Lakes Service* v. *International Export Lines*, 315 F. 2d 519, 523 (4th Cir. 1963); *Banking & Trading Corp.* v. *Flocte*, 257 F. 2d 765, 769–70 (2d Cir. 1958).

[38] For example, see Brief for Appellant at 30.

[39] *See Orient Mid-East Great Lakes Service* v. *International Export Lines supra.*

mentary evidence of a binding agreement in writing between the parties thereto," and the impact of this requirement does inescapably fall on both the Government and the private party to the contract. Most persuasively perhaps, it appears impossible to give effect to the avowed primary objective of Congress without construing the 1955 Act as a statute of frauds. We have here the Government seeking damages on the basis of a purely oral agreement, admittedly incomplete or confused on some terms argued to be vital to the obligations of the parties, intended to be but never reduced to writing before repudiation. If we enforce the Government's claim here on a purely oral charter contract, the next case arising may well be similar to *Clark* v. *United States, i.e.*, a claim by the private party likewise based on a purely oral agreement, in which the facts hypothetically might show that the government official blithely ignored all the required written safeguards of the 1955 Act. If we adopt the Government's theory here, the very restricted interpretation of the 1955 Act, in our hypothetical next case the Government could not successfully urge the unenforceability of a purely oral charter--it would have been stripped of this external defense and concomitantly of protection against the very internal abuses which even the Government here agrees was Congress' primary objective in the 1955 statute.

It is thus dubious that the Government would want to contract orally, or that it should. This decision, by requiring that the Government comply with statutes and its own regulations by requiring a writing before an agreement of this type may be enforced by the courts, is in the long-range interest of the Government and the public.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

September Term, 1973—Civil Action 2306–71

No. 72–2109

UNITED STATES OF AMERICA

v.

AMERICAN RENAISSANCE LINES, INC., APPELLANT

Appeal from the United States District Court for the District of Columbia

Before: BAZELON, *Chief Judge,* WILKEY, *Circuit Judge* and VAN PELT, * United States Senior District Judge for the District of Nebraska.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that this case is hereby remanded to the District Court in accordance with the opinion of this Court filed herein this date.

Per Curiam for the Court:

HUGH E. KLINE,
Clerk.

Date: February 27, 1974.

Opinion for the Court filed by Circuit Judge Wilkey.

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX C

United States District Court for the District of Columbia

Civil Action No. 2306–71

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN RENAISSANCE LINES, INC., DEFENDANT

ORDER OF CERTIFICATION

Upon consideration of defendant's motion for certification of a controlling question of law for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and plaintiff's opposition thereto, the Court finds that the question of whether the Commodity Credit Corporation may enter into a charter contract by oral agreement in light of 31 U.S.C. § 200, the Federal Procurement Regulations and C.C.C.'s published Regulations involves a controlling question of law as to which there is substantial ground for difference of opinion. The Court further finds that such an immediate determination of the question would be dispositive of the case on the merits. Therefore, it is this 16th day of August 1972,

ORDERED that the foregoing question of law be certified for immediate appeal.

JUNE L. GREEN,
U.S. District Judge.

Filed: August 16, 1972.

JAMES F. DAVEY,
Clerk.

APPENDIX D

Federal Procurement Regulation, 41 C.F.R. Subpart 1–1.2, provides in pertinent part:

> 1–1.201 *Definitions.*
>
> For the purposes of this chapter, and unless otherwise indicated, the following terms have the meanings set forth in this subpart.
>
> * * * * *
>
> 1–1.208 *Contract.*
>
> "Contract" means establishment of a binding legal relation basically obligating the seller to furnish personal property or nonpersonal services (including construction) and the buyer to pay therefor. It includes all types of commitments which obligate the Government to an expenditure of funds and which, except as otherwise authorized, are in writing. In addition to a two-signature document, it includes all transactions resulting from acceptance of offers by awards or notices of awards; agreements and job orders or task letters issued thereunder; letter contracts; letters of intent; and orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance. It also includes contract modifications.

7 C.F.R. 11.12(a) provides:

> (a) *General.* The cost of ocean transportation will be financed by CCC only when specifically provided for in the purchase authorization. Unless the purchase authorization provides otherwise, this section will apply to the financing of ocean transportation. Unless otherwise specifically provided in the applicable purchase authorization or unless otherwise requested by FAS, the pertinent terms of all proposed

charters (whether single voyage charters, consecutive voyage charters, or time charters) and all proposed liner bookings must be submitted to the appropriate USDA Office (see paragraph (b) of this section) for review and approval prior to fixture of the vessel. Tentative advance approvals may be obtained by telephone or telegram, provided Form CCC 105, Ocean Shipment Data—PL 480 ("Request for Vessel Approval"), is furnished promptly conforming the information supplied by telephone or telegram. Approvals of charters and liner bookings will be given on Form CCC106, "Advice of Vessel Approval." If the purchase authorization requires that a part of the tonnage of the commodity be shipped on privately owned U.S.-flag commercial vessels, the offices specified in paragraph (b) of this section shall determine the quantity of the commodity which must be shipped on such U.S.-flag vessels.

22 C.F.R. Part 211 provides in pertinent part:

PART 211—TRANSFER OF FOOD COMMODITIES FOR USE IN DISASTER RELIEF AND ECONOMIC DEVELOPMENT, AND OTHER ASSISTANCE

211.1 General purpose and scope.

(a) *Terms and conditions.* This Part 211 contains the regulations prescribing the terms and conditions governing the transfer of agricultural commodities to foreign governments, U.S. voluntary agencies, or intergovernmental organizations (except the World Food Program and United Nations Relief and Works Agency) pursuant to Title II, the Agricultural Trade Development and Assistance Act of 1954, as amended (Public Law 480, 83d Congress, as amended) (1) to meet famine or other urgent or extraordinary relief requirements; (2) to combat malnutrition, especially in children; (3) to promote economic and community development in friendly developing areas; (4) for

needy persons, nonprofit school lunch programs, and preschool feeding programs outside the United States.

* * * * *

211.2 Definitions.

(a) "AID" means the Agency for International Development or any successor agency, including, when applicable each USAID. "USAID" means an office of AID located in a foreign country "AID/W" means the Office of AID located in Washington, D.C.

(b) "Commodities" means food, feed, or fiber transferred or available for transfer to cooperating sponsors under any of the legislation referred to in this part and food, feed, or fiber exchanged for such transferred commodities as provided in this Part 211.

(c) "CCC" means the Commodity Credit Corporation, a corporate agency and instrumentality of the United States within the U.S. Department of Agriculture.

U.S. GOVERNMENT PRINTING OFFICE: 1974

INDEX

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED 1

SUPPLEMENTAL STATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT 3

CONCLUSION 14

CITATIONS

CASES:

Banking & Trading Corp. v. *Floete*, 257 F.2d 765 (C.A. 2, 1958) 4, 8, 9

Clark v. *United States*, 95 U.S. 539 (1877) 11

David Crystal, Inc. v. *Cunard Steam-Ship Co.*, 223 F.Supp. 273 (S.D.N.Y. 1963), aff'd 339 F.2d 295 (C.A. 2, 1964), cert. den. 380 U.S. 976 (1965) 11

Escote Manufacturing Corp. v. *United States*, 169 F.Supp. 483 (Ct. Cl. 1959) 8

In re King-Porter Co., 446 F.2d 722 (C.A. 5, 1971) 11

Orient Mid-East Great Lakes Service v. *International Export Lines*, 315 F.2d 519 (C.A. 4, 1963) 4, 8, 9

Penn-Ohio Steel Corp. v. *United States*, 354 F.2d 254 (Ct. Cl. 1965) 8

United States v. *Hext*, 444 F.2d 804 (C.A. 5, 1971) 11

United States v. *New York & Porto Rico S.S. Co.*, 239 U.S. 88 (1915) 14

STATUTES AND REGULATIONS:

Act of June 2, 1862, 12 Stat. 411 11

Act of June 17, 1862, 12 Stat. 597 11

Act of June 15, 1917, Chap. 19, § 1, 40 Stat. 198 11

Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 40 U.S.C. §§ 471, *et seq.* 9

P.L. 480, 68 Stat. 454, as amended, 7 U.S.C. § 1691 6

7 U.S.C. §§ 1701-10 6

7 U.S.C. §§ 1721-25 ..... 6, 7

Page

Supplemental Appropriation Act of 1955, § 1311, 68 Stat. 830, as amended, 31 U.S.C. § 200(a) 2, 3, 8, 9, 10, 11
Uniform Commercial Code § 2-201 11
28 D.C. Code § 2-201 11
7 C.F.R. § 11.12 .....3, 5, 6
15 U.S.C. § 714c(g) 7
22 C.F.R. Part 211 ..... 5, 6
41 C.F.R. §§ 1-1.002, 1-1.006-1, 1-1.208, 4-1.104-1, 7-1.103 5
41 C.F.R. 1-1.208, 1-1.219 ..... 2, 5

MISCELLANEOUS:

E.O. 10900, January 10, 1961, 26 Fed. Reg. 143 7
35 Comp. Gen. 319 (1955) 8
Comp. Gen. Dec. No. B-118654, August 10, 1963 .....8, 13
H. Rep. No. 2663, 83d Cong., 2d Sess. 18 (1934) 8
100 Cong. Rec. 11476 13
Report of the Committee on Appropriations No. 2266 (83d Cong.) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-25

UNITED STATES OF AMERICA, *Petitioner*

v.

AMERICAN RENAISSANCE LINES, INC., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In negotiating a full shipload charter, did the Commodity Credit Corporation (CCC) and respondent shipowner intend to be bound by an oral agreement concluded by telephone, where the parties negotiated in contemplation of the execution of a specific, complex written charter form and the negotiations broke down before the form was executed or important provisions therein agreed to?

2. May CCC maintain an action for damages for breach of an unperformed charter contract with a private shipping firm, concluded without any written

confirmation or documentary evidence of an offer and acceptance, in light of—

(a) 31 U.S.C. § 200(a)(1), which requires "documentary evidence" of an "agreement in writing" for the creation of an obligation by the United States;

(b) Sections 1-1.208 and 1-1.219 of the FPR, which define "contract" and "contract modification" in terms of a requirement for "a writing"; and

(c) CCC's own regulations requiring the conclusion of any contract for the rendering of ocean transportation services by means of a written contract on CCC's own forms.

SUPPLEMENTARY STATEMENT OF FACTS

CCC's telegram invitation of May 4, 1966 stated that "FOR FULL CARGOES USDA GRAIN CHARTER PARTY DATED MARCH 1, 1963 (REVISED) TO BE USED." This charter form is a highly detailed eight-page agreement, with blank spaces provided for insertion of material pertinent to each particular contract. In a telephone call from ARL's agent to CCC on May 9, 1966, ARL quoted rates in short tons. CCC claims, however, that rates were quoted in long tons. The invitation left open for negotiation choice of ports of loading, loading and discharge demurrage and dispatch, and other charter details. These matters were not resolved or agreed to on May 9. This was ARL's first and only negotiation with the CCC for a charter from the United States (Appendix 93).

The price quoted by ARL was contingent on ARL's successful purchase of a vessel. On May 11, 1966, ARL's agent called CCC to say the vessel had been purchased, but shortly thereafter called again to say the purchase had fallen through (App. 4, 35). The telegram from ARL to CCC on May 18, 1966 did not admit

liability for breach but offered to pay CCC's storage charges on a voluntary basis so as to retain the goodwill of that agency for possible future business (App. 199).

ARL's agent stated in his deposition that he had no indication this was not a charter for CCC and was not aware of distinctions which the government was trying to make between Title I and Title II PL-480, so as to bring in A.I.D.'s regulation published only on April 21, 1966 (Deposition of Clifford Elkins, p. 55).

Suit for breach of an oral contract was instituted by the government only after the government (A.I.D.) and ARL had settled an unrelated action by ARL by consent judgment in favor of ARL in Civil Action No. 68-285 (E.D.N.Y. 1971). The government in that case did not claim a set-off, but after the judgment issued, refused to pay the judgment amount of $43,421 raising this new claim for the first time as a ground for withholding funds. Suit was filed 5½ years after the alleged oral agreement was reached by telephone.

REASONS FOR DENYING THE WRIT

1. The government is interested primarily in reversing the construction given to 31 U.S.C. § 200(a)(1) by the Court of Appeals. But the statutory-construction issue cannot be effectively isolated from the three other independent grounds upon which the decision stands.[1]

[1] The Court of Appeals made clear in its conclusion that it was supporting its decision in equal part upon a contract construction basis, i.e., the intention of the parties as indicated by the entire circumstances, the complexity of the contemplated written agreement, and the "extent of the unfilled blanks in the form". The Appeals Court also separately rested its decision upon the requirement for a writing found in the FPR and in CCC's own Title I PL-480 regulation, 7 C.F.R. § 11.12.

None of the other three grounds is by any stretch "certworthy", and the government must pass through a minefield of difficulties to get past the three other grounds before it can hope to engage the attention of the Court on the statutory issue.

The government can not, however, get by the contract interpretation issue. The case law is persuasive that where parties negotiate orally in contemplation of a written contract, their intention is presumptively that they shall be bound only when that written contract is executed. This becomes especially true where the contract to be signed is complex, many important subsidiary terms are still to be negotiated, and a government agency is one party to the negotiations.[2]

---

[2] See, e.g., *Orient Mid-East Great Lakes Service* v. *International Export Lines*, 315 F.2d 519, 523 (C.A. 4, 1963), where the charter agreement was negotiated between two private parties. In *Banking & Trading Corp.* v. *Floete*, 257 F.2d 765, 769-70 (C.A. 2, 1958), the Court noted "factors to be considered in determining whether parties are bound prior to the execution of an integrated writing". In that case, as here, a government agency was one of the parties. Among such relevant factors were these:

(1) "[W]hether [the contract] has few or many details";

(2) "[W]hether the amount involved is large or small";

(3) "[W]hether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract";

(4) "Whether during the negotiations the parties have fully agreed upon all of the details of the transaction, or whether pending final execution of a written document some of those details have remained unsettled";

(5) And whether one of the parties is a government agency.

"As a government agency, RDC was subject to investigation and audit concerning the use which it made of public funds. Hence it was important that whenever RDC en-

The government can not get by the FPR argument, because these regulations apply both to CCC and to A.I.D.[3] Introducing the A.I.D. regulation, 22 C.F.R. Part 211, provides the government with no help. The A.I.D. regulation does not authorize the conclusion of an oral contract; nor does it in any way modify A.I.D.'s acceptance of the FPR provisions. The FPR requirement for expression of an obligation "in writing" remains unaffected by the A.I.D. regulation to which the government seeks to draw attention. Nor can the government get by the CCC regulation which requires a writing in connection with charter approvals.[4] After

---

tered into contractual relationships its legal rights and obligations be clearly defined."

Applying these factors, the Court refused to find that a contract had been concluded in the absence of the execution of a written document.

[3] The definitional sections of the FPR, 41 C.F.R. §§ 1-1.208 and 1-1.219, define a "contract" as an obligation expressed "in writing" and a "contract modification" as any "written alteration." These regulations apply to any direct procurement by a government agency. A Federal agency may, in that section of the regulations reserved to it, change or supplement the FPR to accord with specific agency needs, 41 C.F.R. §§ 1-1.002 and 1-1.006-1. Both CCC and A.I.D. accepted the FPR and did not modify the requirement for a writing (41 C.F.R. §§ 4-1.104-1 and 7-1.103). Because the FPR provisions in question go to the very heart, the definitional matter of what is a contract, whenever "contract" appears anywhere in the regulations it connotes an offer and acceptance "in writing".

[4] 7 C.F.R. § 11.12 declares:

§ 11.12 Ocean Transportation

(a) *General* • • • [T]he pertinent terms of all proposed charters . . . and all proposed liner bookings must be submitted to the appropriate USDA Office (see paragraph (b) of this section) for review and approval prior to fixture of the vessel. Tentative advance approvals may be obtained by

all, this was a CCC telegram offer, a CCC oral negotiation, CCC's regulation, and CCC's personnel; there was no relationship at all in this case to A.I.D.[5]

---

telephone or telegram, provided Form CCC 105, Ocean Shipment Data—PL 480 ("Request for Vessel Approval"), is furnished promptly confirming the information supplied by telephone or telegram. Approvals of charters and liner bookings will be given on Form CCC 106, "Advice of Vessel Approval."

• • • • •

(b) *Request for vessel approval.* In order to obtain approval of proposed vessel bookings the following forms shall be submitted in duplicate to the office indicated:

• • • • •

(2) *For commodities other than cotton.* Form CCC 105, Ocean Shipment Data—PL 480—"Request for Vessel Approval," shall be submitted to the Director, Program Operations Division, Foreign Agriculture Service, U.S. Department of Agriculture, Washington, D.C., 20550.

• • • • •

(f) *Advice of vessel approval.* Advice of vessel approval will be issued as follows:

• • • • •

(2) *For commodities other than cotton.* Form CCC 106 signed by the Director, Program Operations Division, ...

[5] The government seeks to persuade the Court, as it was unable to persuade the Court of Appeals, that Title II PL-480, 7 U.S.C. §§ 1721-25, relating to food shipments for needy people, and not Title I PL-480, 7 U.S.C. §§ 1691, 1701-10, authorizes the procurement of goods and ocean transportation in this particular case. The significance of the distinction appears to be that CCC's published regulation deals only with Title I (and 7 C.F.R. § 11.12 implements ocean transport shipments under Title I.) CCC has no Title II regulation. On April 21, 1966, A.I.D. published a regulation under the authority of Title II PL-480 and later collated that regulation into 22 C.F.R. Part 211. But no one outside of government could possibly know or care about these distinctions. At a deposition called for by the government, ARL's agent who conducted the oral negotiations on May 9, 1966 testified he did not know of a distinction between Title I and Title II PL-480, had no reason to know, and had no basis not to believe that this was a

Aware of its difficulties, the government drags in CCC's enabling legislation, 15 U.S.C. 714c(g), in the hope of leap-frogging the alternative grounds for decision with an argument that makes much of CCC's enabling legislation allowing CCC to use "customary channels, facilities and arrangements of trade and commerce." But such generalized language contains no Congressional purpose or authorization that CCC shall not be bound by the FPR, by that agency's own published regulations, or by any of numerous other statutory enactments governing procurement by government entities.[6]

CCC sponsored shipment. For the first time in these proceedings the government makes reference to E.O. 10900, 26 Fed. Reg. 143, for the proposition that the President had directed the Secretary of State and not CCC to oversee functions reserved to the President by Title II PL-480. But an examination of Title II legislation indicates that the Congress vested the administration of the Title II freight program in CCC, a government corporation, and not in the President, 7 U.S.C. § 1723. The E.O. can only affect 7 U.S.C. §§ 1721-22 which specify functions reserved to the President. The E.O., even had it been known to ARL's agent, would certainly not have pointed him to A.I.D.; and the A.I.D. regulations had just come out 13 days before the May 4, 1966 bid solicitation, so that ARL's agent would have had to be familiar with the daily Fed. Reg. publication to catch the A.I.D. issuance. He also would have had to determine whether the food shipment covered by CCC's telegram was a shipment to a "friendly government" under Title I "to combat hunger and malnutrition and to encourage economic development" (7 C.F.R. § 1691) or a Title II shipment "to meet famine or other urgent or extraordinary relief requirements; [or] to combat malnutrition, especially in children" (7 U.S.C. § 1721).

[6] Of course, if this were truly an A.I.D. and not a CCC program, there is no reason even to consider CCC's enabling legislation. It would be curious to allow the government to apply an A.I.D. regulation, when it suited one purpose, but CCC's enabling legislation when it suited another.

In any event, cases cited in the government's petition at footnote No. 9 hardly prove the contention that it is customary to

2. There is no conflict on the statutory issue between the decision of the Court of Appeals and decisions of the Court of Claims. *Escote Manufacturing Corp.* v. *United States,* 169 F.Supp. 483 (Ct.Cl. 1959), and *Penn-Ohio Steel Corp.* v. *United States,* 354 F.2d 254 (Ct.Cl. 1965), did not even consider 31 U.S.C. § 200 (a)(1). The reference in these cases to an absence of a federal statute of frauds was at best only a passing observation.[7]

Decisions by the Comptroller General which have focused on 31 U.S.C. § 200(a)(1) have supported the notion that the underlying commercial contract representing an obligation of the United States must consist of an offer and an acceptance "in writing".[8]

---

regard a maritime charter as enforceable before execution of the written charter. In none of the cases footnoted, was a government agency a party; most of the cases do not consider charters at all; and neither the statute nor the question of oral agreements looking to execution of complex written forms is considered in any of these cases. *Orient Mid-East Great Lakes Service, supra* and *Banking & Trading Corp., supra* are the only well-reasoned opinions in the area.

[7] Indeed, the oral amendment to the lease in Penn-Ohio occurred in January 1954, before the statute was enacted and five years before the FPR was issued. *Escote* arose before the FPR was issued. The dispute in that case did in fact involve a written agreement and the Court spoke of an oral contract when in reality it was referring only to an unsigned written agreement.

[8] At 35 Comp. Gen. 319 (1955) the Comptroller General declared that "Before it can be held that there was a binding agreement, in each instance the following factors must be present: . . . Each bid must have been in writing." In decision No. B-118654 dated August 10, 1965 (the full text of which was included at pp. 101-104 of the Appendix), the Comptroller General quoted from the legislative history of the section, H.Rep. No. 2663, 83d Cong., 2d Sess. 18 (1954), reproduced in part at 494 F.2d at p. 1065, and then stated: "The question for decision is whether the award notice signed by the contracting officer is documentary evi-

3. The government exaggerates the significance of the statutory-construction issue. If the interpretation of 31 U.S.C. § 200(a)(1) given by the Court of Appeals were to be overturned, nothing much would be changed thereby. The FPR and CCC's own regulations would still bar the enforceability of purely oral charters. To reach the result which the government feels is important, not only would the present interpretation of the statute have to be overturned, but the GSA would also have to amend the FPR.[9]

In arguing for the importance of the issue, the government suggests that in emergency situations ("domestic disaster relief", petition, p. 7) oral contracts are necessary. But here there clearly was no emergency procurement. The telegram solicitation for offers was issued on May 4, 1966, but oral negotiations took place

---

dence of a binding agreement in writing between the parties to permit the obligation of funds under the requirements of § 1311 in the absence of any evidence in writing that the contractor has agreed to the price and terms contained therein as well as to the usual general provisions required to be included in Government contracts. As a general proposition, we think not. * * * [T]he language quoted above from the Conference Report contemplates documentary evidence of both an offer and acceptance imposing liability on both parties even though the definitive contract will be executed later." This is essentially the same rule adopted without regard to § 200(a)(1) for government agents in *Banking and Trading Corp., supra*, at pp. 769-70.

[9] The government states in its petition (pp. 7-8) that the GSA makes use of oral contracts. But the GSA is also the agency responsible under the Federal Property Act for issuing and modifying the FPR. The issue of oral contracts can hardly have been perceived by GSA as of burning importance, since that agency has since 1959 allowed the FPR to declare, without change, that contracts and contract modifications must be "in writing". The GSA view on this matter was never communicated by the government to either of the lower courts which considered this matter.

days later on the 9th and 11th of May. The government agency can almost always ask for a telex or telegram response or confirmation, as it could have here. Such a telegram recordation of the offer will avoid problems such as this case will present if it goes to trial as to what exactly was agreed to (long tons or short tons, what was the daily demurrage/dispatch rate, and what exactly did the parties intend in numerous other important details of the overall arrangement).

Significantly, emergency procurement is not an issue under the statute. A government agency having to undertake emergency procurement can avoid the requirement for a "writing" in paragraph (a)(1) of the statute by relying upon the "public exigency" exception set forth in paragraph (a)(4) of the same statute.[10] That in the present case no emergency procurement was involved can be seen from the fact that the government never urged that these charter negotiations should be encompassed under subparagraph (a)(4) rather than (a)(1) of 31 U.S.C. § 200.

Broad consequences do not attach to the statutory-construction issue. The government has not cited a single case in which litigation was originated by the United States for breach of an oral contract, and respondent can find none either. There is reason to believe this case is the first time ever that such a litigation has been initiated by the government and there is no

---

[10] The requirement for "a binding agreement in writing" appears only in 31 U.S.C. § 200(a)(1). Various subsections of § 200(a) set out alternatives. Subparagraph (a)(4) authorizes the creation of an obligation, without mentioning the requirement for an agreement in writing, "when necessitated by public exigency or for perishable subsistence supplies." CCC's problem then would appear to be not with the statute, but with the FPR and with its own regulations which do not contain a similar exception for emergency procurement.

reason to expect many such other cases to arise. There are no such other cases now pending. The United States has comfortably existed with federal statutes of frauds for a good portion of its history.[11]

In any event, the tendency in commercial matters has in modern times been towards and not away from a requirement for a writing.[12] In governmental affairs the

---

[11] Compare, the Act of June 2 and 17, 1862, 12 Stat. 411 and 597, considered in *Clark* v. *United States*, 95 U.S. 593 (1877), and the Act of June 15, 1917, Chap. 19, § 1, 40 Stat. 198 (repealed in 1941 by 55 Stat. 743). These statutes required a "writing" and the signatures of both contracting parties. With respect to the 1917 legislation, the filing of the document with an office of the Interior Department was also required. The only gap in recent U.S. history in which no such statute applied appears to be the interval 1941 through August, 1954. Whatever 31 U.S.C. § 200 (a)(1) might otherwise mean, at least since 1959, when the FPR was issued, government agencies have been operating under a regulatory-type statute of frauds.

[12] For comparison, note that the Uniform Commercial Code, accepted as Federal law, *In re King-Porter Company*, 446 F.2d 722, 732 (C.A. 5, 1971); *United States* v. *Hext*, 444 F.2d 804, 810-11 (C.A. 5, 1971), and applied in admiralty matters, *David Crystal, Inc.* v. *Cunard Steamship Company*, 223 F.Supp. 273, 286-87 (S.D.N.Y. 1963), aff'd, 339 F.2d 295 (C.A. 2, 1964), cert. denied 380 U.S. 976 (1965), states in § 2-201(1) that any contract covering a price in excess of $500 "is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties". Although the UCC provisions speak specifically about the sale of goods, the line of demarcation at $500 adopted by the drafters of the Code suggests an order of magnitude for the application of a presumption concerning the intention of parties negotiating a charter (claimed by the government to have a value of $354,481—assuming long tons—and claimed by ARL to have a value closer to $400,000—assuming short tons) whether to be bound by oral negotiations prior to executing a complex legal document. The UCC is now law in fifty states and the § 2-201(1) provision shows that the government's argument runs against the current of the times. The UCC provision in its D.C. enactment appears at 28 D.C. Code, § 2-201.

tendency has been for government agencies to run on paper records and determinations and not on oral promises and acceptances.

4. This case is an unattractive vehicle in which to consider the statutory-construction issue. It is a case which should be considered a garden-variety breach of contract claim turning upon the presumed intention of the parties. If the Court were to reverse, the matter would then still have to go to trial. But the oral negotiations which allegedly resulted in an oral contract occurred 8½ years ago, and government officials involved in the matter in May 1966 have departed. It would be difficult to reconstruct those telephone conversations accurately after such a long period. And it is likely that after such a trial the government would still not prevail because of the failure of the individuals to the May 9 telephone conversation to agree on all important terms.

There is, in addition, a suspicion that this case arose only because the government had second thoughts about the consent judgment to which it had agreed with ARL in the unrelated case before the Eastern District of New York, Civil Action No. 68-285, judgment issued April 27, 1971. The government never raised a set-off claim against ARL in that case based upon the alleged oral contract in this case. The government's refusal shortly thereafter to make payment on the judgment suggests that the oral contract matter was dredged up as an afterthought—an excuse for withholding funds because CCC and A.I.D. had misgivings about the wisdom of the settlement. Even so, the government waited 5½ years after the May 1966 conversations to initiate suit. In these circumstances, the Court should not accept this case as a vehicle to test the correctness

of the statutory interpretation adopted by the Court of Appeals.

5. If the Court reaches the statutory construction issue, nothing in the government's arguments on the statute will be found persuasive. There is no basis for the contention that the statute is designed to serve *only* a recordation purpose and not concurrently and unavoidably a statute of frauds objective as well. The two functions of the statute cannot be separated. The legislative history fully supports the notion that the Congress had in mind an underlying offer and acceptance when it enacted the legislation.[13] The government's argument of "no mutuality" carries little conviction with it;[14] and its reliance upon *United States* v. *New*

---

[13] Congress was concerned that the Administration was obligating funds and making commitments to third parties which could not be verified to the Congress and which members of Congress suspected were not true, valid obligations in a commercial sense. Thus the House Report on the bill refers to a "true obligation" as opposed to merely an informal, oral, non-binding obligation of the government. Report of the Committee on Appropriations No. 2266 (83d Cong.), pp. 49-50. In the debates, Congressman Vorys, sponsor of the bill, spoke of "a true, *legal*, actual obligation", 100 Cong. Rec. 11476 (emphasis added). Such language does not appear concerned with accounting and reporting procedures alone, but rather refers unquestionably, to the binding force of the underlying contract between a government agency and a third party.

[14] The text of the statute does not support a "no-mutuality" reading, and there is no indication that the Congress intended a one-sided application for the statute. On the contrary, the Conference Committee Report, H.R.Rep. No. 2663, 83d Cong. 2d Sess. (1954), stated that § (a)(1) of the statute "contemplates documentary evidence of both an offer and an acceptance imposing liability on both parties." This language was quoted by the Comptroller General in interpreting the statute in decision No. B-118654 (App. p. 102).

Other statutes of frauds invariably require that an undertaking appear in writing and be signed by the party against whom enforcement is sought. Cf., UCC § 2-201.

York & Porto Rico S.S. Co., 239 U.S. 88 (1915) is wholly unpersuasive.[15]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KIRKWOOD, KAPLAN, RUSSIN & VECCHI
1218 16th Street, N.W.
Counsel for Respondent
by JULIUS KAPLAN
MATTANIAH EYTAN

[15] In that case, the private contractor had signed the contract. In a suit by the government, the statutory requirement had been fully met as against the party sought to be charged with liability. That case is in any event 60 years old and refers to an earlier statute requiring a seal. It was only the seal which was missing from the document there at issue.